IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 197_
NO. 76-1830

COMMONWEALTH OF PENNSYLVANIA,
PETITIONER

v.

HARRY MIMMS,
RESPONDENT

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PETITION FOR WRIT OF CERTIORARI
TO
THE SUPREME COURT OF PENNSYLVANIA

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# PETITION FOR WRIT OF CERTIORARI
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THE PETITIONER, THE COMMONWEALTH OF PENNSYLVANIA, RESPECTFULLY PRAYS THAT A WRIT OF CERTIORARI ISSUE TO REVIEW THE JUDGMENT AND OPINION OF THE PENNSYLVANIA SUPREME COURT ENTERED ON FEBRUARY 28, 1977, IN THE ABOVE-CAPTIONED CASE.

## OPINIONS BELOW

THE OPINION BELOW OF THE PENNSYLVANIA SUPREME COURT, WHICH IS UNOFFICIALLY REPORTED AT 370 A.2D 1157 (1977), IS SET OUT IN THE APPENDIX. (THIS OPINION HAS NOT YET BEEN PUBLISHED IN THE OFFICIAL STATE REPORTS.) ALSO INCLUDED IN THE APPENDIX IS THE OPINION OF THE PENNSYLVANIA SUPERIOR COURT WHICH IS OFFICIALLY REPORTED AT 232 PA. SUPERIOR CT. 486 (1975).

## JURISDICTION

THE ORDER OF THE PENNSYLVANIA SUPREME COURT WAS ENTERED ON FEBRUARY 28, 1977. A TIMELY APPLICATION FOR REARGUMENT, WHICH WAS THEREAFTER FILED BY PETITIONER, WAS DENIED ON MARCH 28, 1977. THIS PETITION FOR CERTIORARI WAS FILED WITHIN NINETY (90) DAYS OF THAT DENIAL. THE JURSIDICTION OF THIS COURT IS INVOKED PURSUANT TO 28 U.S.C. §1254(1).

## QUESTIONS PRESENTED

ARE THE FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION VIOLATED IF POLICE OFFICERS, ROUTINELY AND SOLELY FOR REASONS OF SELF-PROTECTION, ORDER MOTORISTS, WHO HAVE BEEN LEGALLY DETAINED FOR A TRAFFIC OFFENSE, TO GET OUT OF THEIR VEHICLES WHILE DETAINED?

IN VIEW OF THE DE MINIMUS NATURE OF THIS INTRUSION, DID THE PENNSYLVANIA SUPREME COURT INCORRECTLY WEIGH THE PUBLIC AND PRIVATE INTERESTS INVOLVED AND NEEDLESSLY INCREASE THE RISKS FACED BY THE LAW ENFORCEMENT OFFICERS OF THE COMMONWEALTH?

## CONSTITUTIONAL PROVISIONS INVOLVED

UNITED STATES CONSTITUTION, AMENDMENT FOURTEEN, SECTION ONE.

ALL PERSONS BORN OR NATURALIZED IN THE UNITED STATES, AND SUBJECT TO THE JURISDICTION THEREOF, ARE CITIZENS OF THE UNITED STATES AND OF THE STATE WHEREIN THEY RESIDE. NO STATE SHALL MAKE OR ENFORCE ANY LAW WHICH SHALL ABRIDGE THE PRIVILEGE OR



IMMUNITIES OF CITIZENS OF THE UNITED STATES; NOR SHALL ANY STATE DEPRIVE ANY PERSON OF LIFE, LIBERTY, OR PROPERTY, WITHOUT DUE PROCESS OF LAW; NOR DENY TO ANY PERSON WITHIN ITS JURISDICTION THE EQUAL PROTECTION OF THE LAWS.

UNITED STATES CONSTITUTION, AMENDMENT FOUR.

THE RIGHT OF THE PEOPLE TO BE SECURE IN THEIR PERSONS, HOUSES, PAPERS, AND EFFECTS, AGAINST UNREASONABLE SEARCHES AND SEIZURES, SHALL NOT BE VIOLATED, AND NO WARRANTS SHALL ISSUE, BUT UPON PROBABLE CAUSE, SUPPORTED BY OATH OR AFFIRMATION, AND PARTICULARLY DESCRIBING THE PLACE TO BE SEARCHED, AND THE PERSONS OR THINGS TO BE SEIZED.

## STATUTORY PROVISION INVOLVED

THE PENNSYLVANIA VEHICLE CODE, ACT OF APRIL 29, 1959, P.L. 58 §1221; AS AMENDED JULY 16, 1970, P.L. __, No. 166 §1, 75 P.S. §1221(A)

THE OPERATOR OF ANY VEHICLE OR ANY PEDESTRIAN CHARGED WITH A VIOLATION OF ANY SUMMARY PROVISIONS OF THIS ACT [THE PENNSYLVANIA VEHICLE CODE], SHALL STOP UPON REQUEST OR SIGNAL OF ANY PEACE OFFICER, WHO SHALL BE IN UNIFORM, AND SHALL EXHIBIT HIS BADGE OR OTHER SIGN OF AUTHORITY, AND SHALL, UPON REQUEST, EXHIBIT HIS REGISTRATION CARD, OR OPERATOR'S LICENSE CARD, OR LEARNER'S PERMIT, OR OTHER MEANS OF IDENTIFICATION IF A PEDESTRIAN, AND SHALL WRITE HIS NAME IN THE PRESENCE OF SUCH PEACE OFFICER, IF SO REQUIRED FOR THE PURPOSE OF ESTABLISHING HIS IDENTITY.

## STATEMENT OF THE CASE

### Procedural History

Respondent, Harry Mimms, was charged in the Court of Common Pleas of Philadelphia County, as of October Sessions, 1970, No. 746, with violating the Uniform Firearms Act and carrying a concealed deadly weapon. These charges were lodged as a consequence of his illegal possession of a .38 caliber revolver. A pre-trial motion to suppress physical evidence (the revolver) was heard and denied by the Honorable Edward Bradley on December 13, 1971. Trial was held before the Honorable James T. McDermott, sitting with a jury, on March 14, 1972, and March 15, 1972. At its conclusion, respondent was found guilty on both counts of the indictment. Following the denial of post-verdict motions, respondent was sentenced to one and one-half (1-1/2) to three (3) years imprisonment on the charge of unlawfully carrying a firearm without a license. Sentence was suspended on the charge of carrying a concealed deadly weapon.

A direct appeal was taken to the Superior Court of Pennsylvania which affirmed the conviction. Commonwealth v. Mimms, 232 Pa. Superior Ct. 486, 335 A.2d 516 (1975). (Appendix, infra at pp. 11a-17a.) Following the grant of a petition for allowance of appeal, the Supreme Court of Pennsylvania reversed the conviction in an opinion issued on February 28, 1977. Commonwealth v. Mimms, ___ Pa. ___, 370 A.2d 1157 (1977). (Appendix, infra at pp. 1a - 9a.) An application for reargument, which was filed by the Commonwealth on March 14, 1977, was denied on March 28, 1977.



### Facts

Respondent's conviction arose from his unlawful possession of an operable, unregistered, and loaded .33 caliber revolver (N.T. 6, 17, 5).[1] The weapon was found on his person after he was stopped by the police for operating a vehicle with an expired license tag (N.T. 3, 12). At the time the vehicle was stopped by Officers Kurtz and Milby of the Philadelphia Police Department, it was occupied by respondent and one other person (N.T. 2-3, 4, 12). When Officer Kurtz approached the automobile on the driver's side, he immediately asked respondent to step from the vehicle (N.T. 3-4). The officer testified at trial that he routinely makes such a request after any vehicular stop for a traffic violation (N.T. 10). His reason for taking such action is to prevent any person, with whom he would have to come in close proximity, from taking "more advantage" of him by virtue of that person's position inside the car (N.T. 10).

When respondent stepped from the car, Officer Kurtz noticed a large bulge on respondent's hip under his sports coat. For reasons of self protection, he then frisked respondent and removed from his waistband the subject revolver (N.T. 4, 9, 10). Respondent's arrest followed.

By way of defense, both respondent Mimms and his passenger testified that Mimms had not either previously seen, or had on his person, the confiscated revolver (N.T. 25, 31, 41, 42). The jury chose to disbelieve their version of the incident and convicted Mimms.

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[1] "N.T." refers to the trial notes of testimony.

## REASONS FOR GRANTING THE WRIT

THE PENNSYLVANIA SUPREME COURT'S RULING, THAT POLICE OFFICERS ARE PROHIBITED BY THE FOURTH AND FOURTEENTH AMENDMENTS FROM ROUTINELY ORDERING MOTORISTS OUT OF THEIR CARS AFTER A STOP FOR A TRAFFIC VIOLATION, UNJUSTIFIABLY DISREGARDS THE CLEAR NEED FOR POLICE OFFICERS TO TAKE REASONABLE AND MINIMAL PRECAUTIONS FOR THEIR OWN SAFETY. IN VIEW OF THE DE MINIMUS NATURE OF THE INTRUSION ON A CITIZEN'S FREEDOM OF MOVEMENT, THE COURT INCORRECTLY WEIGHED THE PUBLIC AND PRIVATE INTERESTS INVOLVED AND CREATED AN UNREASONABLE RESTRICTION ON POLICE WHICH NEEDLESSLY INCREASES THEIR RISK OF DEATH OR SERIOUS INJURY.

THE QUESTION PRESENTED BY THIS CASE IS WHETHER POLICE OFFICERS, CONSISTENT WITH THE FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, MAY ROUTINELY, AND SOLELY FOR THEIR OWN PROTECTION, ORDER MOTORISTS FROM THEIR CARS AFTER MAKING A LEGAL TRAFFIC STOP.

IN THIS CASE TWO PHILADELPHIA POLICE OFFICERS, JOHN KURTZ AND LESTER MILBY, STOPPED AN AUTOMOBILE OPERATED BY RESPONDENT MIMMS TO ISSUE A TRAFFIC SUMMONS FOR DRIVING WITH AN EXPIRED LICENSE TAG. AS HE APPROACHED THE DRIVER (MIMMS), OFFICER KURTZ DIRECTED HIM TO GET OUT OF THE AUTOMOBILE, AND ASKED HIM TO PRODUCE HIS OWNER'S CARD AND DRIVER'S LICENSE. WHEN MIMMS STEPPED FROM THE VEHICLE, OFFICER KURTZ NOTICED A LARGE BULGE ON MIMMS' HIP UNDER HIS SPORTS JACKET. KURTZ IMMEDIATELY FRISKED MIMMS AND REMOVED FROM HIS WAISTBAND A LOADED .38 CALIBER REVOLVER.

THE ULTIMATE QUESTION, IN RESOLVING THE PROPRIETY OF ANY ACTION CHALLENGED AS VIOLATIVE OF THE FOURTH AMENDMENT, IS WHETHER THE ACTION TAKEN WAS REASONABLE. COOPER V. CALIFORNIA, 386 U.S. 58, 61; 87 S.CT. 788, 790 (1967). THE PENNSYLVANIA SUPREME COURT, RELYING ON THIS COURT'S



DECISION IN TERRY V. OHIO, 392 U.S. 1, 16-19, 88 S. CT. 1868, 1877 (1968), HELD IN THE INSTANT CASE THAT A POLICE OFFICER CAN NOT REASONABLY ORDER A MOTORIST FROM HIS CAR, AFTER A TRAFFIC STOP, UNLESS THE OFFICER CAN "POINT TO SPECIFIC AND ARTICULABLE FACTS WHICH, TAKEN TOGETHER WITH RATIONAL INFERENCES FROM THESE FACTS, REASONABLY WARRANT THE INTRUSION."[2]

THE PENNSYLVANIA SUPREME COURT'S RELIANCE ON TERRY V. OHIO, SUPRA, IN THE FACTUAL CONTEXT PRESENTED HERE IS TOTALLY MISPLACED. TERRY, AS THE PENNSYLVANIA SUPREME COURT NOTED, DEALT WITH "THE EXIGENCIES OF FACE-TO-FACE STREET CONFRONTATIONS BETWEEN A POLICE OFFICER AND A CITIZEN". IN TERRY THE QUESTION PRESENTED WAS WHETHER OR NOT, IN A FACE-TO-FACE CONFRONTATION BETWEEN A POLICE OFFICER AND A CITIZEN, A POLICE OFFICER COULD FRISK THAT CITIZEN FOR HIS OWN PROTECTION. THE QUESTION HERE PRESENTED IS WHETHER OR NOT A POLICE OFFICER, HAVING MADE A LAWFUL STOP OF A MOTORIST, MAY INSIST, FOR HIS OWN PROTECTION, THAT THE LAWFUL CONFRONTATION BE FACE-TO-FACE.[3] IT

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2 THE PENNSYLVANIA SUPREME COURT IN SUPPRESSING THE REVOLVER RELIED SOLELY ON THE FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. IN ITS OPINION, THE COURT STATED,

> "BECAUSE WE CONCLUDE THAT APPELLANT'S REVOLVER WAS SEIZED IN A MANNER WHICH VIOLATED THE FOURTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, WE REVERSE THE SUPERIOR COURT AND REMAND THE CASE FOR A NEW TRIAL." (FOOTNOTE OMITTED)

COMMONWEALTH V. MIMMS, SUPRA, 370 A.2D AT 1158.

3 THE LEGALITY OF THE CONFRONTATION IS NOT AT ISSUE. SECTION 1221(A) OF THE PENNSYLVANIA MOTOR VEHICLE CODE (ACT OF APRIL 29, 1959, P.L. 58, §1221(A), AS AMENDED JULY 16, 1970, P.L. ___, NO. 166, §1, 75 P.S. §1221(A)), AUTHORIZES THE POLICE TO BRIEFLY DETAIN THE OPERATOR OF A MOTOR VEHICLE WHO VIOLATES ANY OF THE SUMMARY PROVISIONS OF THE ACT. MIMMS VIOLATED SECTION 511(A) OF THE MOTOR VEHICLE CODE (ACT OF APRIL 29, 1959, P.L. 53, §511(A), AS AMENDED, 75 P.S. §511(A)).

IS CLEAR FROM THE RECORD THAT OFFICER KURTZ REQUIRED MIMMS TO STEP FROM HIS CAR SOLELY TO ESTABLISH A FACE-TO-FACE CONFRONTATION AND TO FORECLOSE MIMMS FROM BEING ABLE TO MAKE ANY UNOBSERVED MOTIONS. REQUIRING THE FACE-TO-FACE CONFRONTATION SERVED ONE PURPOSE ONLY, SELF-PROTECTION. WHILE THE POLICE OFFICER COULD NOT ARTICULATE ANY SPECIFIC OBSERVABLE FACTS ABOUT MIMMS TO SUGGEST A NEED FOR SELF PROTECTION, SUCH A NEED IS NEVERTHELESS OBVIOUS. PERTINENT STATISTICS INDICATE THAT ROUTINE TRAFFIC STOPS INVOLVE AT LEAST AS MUCH DANGER TO POLICE OFFICERS AS ARRESTS FOR VIOLENT CRIMES.[4] THIS COURT HAS SPECIFICALLY NOTED THE RISKS INCURRED BY POLICE OFFICERS WHEN REQUIRED TO APPROACH VEHICLES. ADAMS V. WILLIAMS, 407 U.S. 143, 92 S.CT. 1921 (1972):

> FIGURES REPORTED BY THE FEDERAL BUREAU OF INVESTIGATION INDICATE THAT 125 POLICEMEN WERE MURDERED IN 1971, WITH ALL BUT FIVE OF THEM HAVING BEEN KILLED BY GUNSHOT WOUNDS. FEDERAL BUREAU OF INVESTIGATION LAW ENFORCEMENT BULLETIN, FEBRUARY 1972, P. 33. ACCORDING TO ONE STUDY, APPROXIMATELY 30% OF POLICE SHOOTINGS OCCURRED WHEN A POLICE OFFICER APPROACHED A SUSPECT SEATED IN AN AUTOMOBILE. BRISTOW, POLICE OFFICER SHOOTING -- A TACTICAL EVALUATION, 54 J. CRIM. L. C. AND P. S. (1963).

ID. AT 148-149, N. 3, 92 S.CT. AT 1924, N. 3.[5]

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4 IN UNITED STATES V. ROBINSON, 414 U.S. 218, 234, 94 S.CT. 467, 476 (1973), THIS COURT SPECIFICALLY DECLINED TO ACCEPT THE ARGUMENT THAT TRAFFIC VIOLATIONS INVOLVE LESS DANGER TO OFFICERS THAN OTHER TYPES OF CONFRONTATIONS. SEE ALSO GUSTAFSON V. FLORIDA, 414 U.S. 260, 94 S.CT. 488 (1973).

5 THE EXTENT OF THE RISK FACED BY POLICE OFFICERS SOLELY IN THE CONTEXT OF ROUTINE TRAFFIC STOPS AND PURSUITS IS CLEAR. IN 1976, 3,793 LAW ENFORCEMENT OFFICERS IN THE COMMONWEALTH OF PENNSYLVANIA WERE ASSAULTED. IN 1975, 4,044 SUCH ASSAULTS OCCURRED. OF THESE TOTALS, 8.1 PERCENT, AND 4.7 PERCENT RESPECTIVELY, INVOLVED ROUTINE TRAFFIC STOPS OR PURSUITS. THESE FIGURES ARE SIGNIFICANT WHEN COMPARED WITH THE PERCENTAGE OF ASSAULTS WHICH OCCURRED IN OTHER SITUATIONS:
(FOOTNOTE CONTINUED ON NEXT PAGE)



IT IS READILY APPARENT THAT EVERY TIME A POLICE OFFICER APPROACHES A VEHICLE HE IS POTENTIALLY PLACING HIS LIFE ON THE LINE. IT IS EQUALLY APPARENT THAT TO REQUIRE A POLICE OFFICER IN THIS SITUATION TO BLINDLY ACCEPT THIS DANGER WITHOUT TAKING THE MOST MINIMAL OF PRECAUTIONS IS TOTALLY UNREASONABLE. BY THE TIME A POLICE OFFICER IN THIS SITUATION CAN ARTICULATE SPECIFIC FACTS WHICH WARRANT A CONCLUSION THAT HIS LIFE IS IN DANGER, IT WILL ALL TOO OFTEN BE TOO LATE TO AVOID THE DANGER (E.G. I ORDERED HIM FROM THE CAR WHEN HE POINTED HIS .38 REVOLVER AT MY HEAD).

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(FOOTNOTE 5 CONTINUED)

| | | 1975 | 1976 |
|---|---|---|---|
| 1. | TRAFFIC STOP OR PURSUIT . . . . . | 4.7% | 8.1% |
| 2. | ROBBERY IN PROGRESS OR PURSUIT OF A SUSPECT . . . . . | 1.6% | 1.0% |
| 3. | BURGLARY IN PROGRESS OR PURSUIT OF A SUSPECT . . . . . | 2.0% | 1.4% |
| 4. | CIVIL DISORDER. . . . . | 1.1% | 1.3% |
| 5. | INVESTIGATION OF SUSPICIOUS PERSONS OR CIRCUMSTANCES. . . . . | 3.2% | 5.1% |
| 6. | AMBUSH. . . . . | 0.3% | 0.5% |
| 7. | MENTALLY DERANGED PERSONS . . . . . | 3.0% | 1.1% |

(UNIFORM CRIME REPORT:CRIME IN PENNSYLVANIA, 1976; AND UNIFORM CRIME REPORT:CRIME IN PENNSYLVANIA, 1975; COMPILED BY THE PENNSYLVANIA STATE POLICE, TABLES 24 AND 20 RESPECTIVELY.)

THE DANGERS FACED BY OFFICERS MAKING TRAFFIC STOPS IN THE CITY OF PHILADELPHIA IS ALSO DEMONSTRATED BY STATISTICS PROVIDED BY THE PHILADELPHIA POLICE DEPARTMENT. IN 1976, OUT OF THE 2,347 REPORTED ASSAULTS ON POLICE OFFICERS, 169 (OR 7.2 PERCENT) INVOLVED VEHICLE INVESTIGATIONS. IN THE FIRST QUARTER OF 1977, 62 OUT OF THE 523 REPORTED ASSAULTS (OR 11.9 PERCENT) OCCURRED DURING A VEHICLE INVESTIGATION. (SEE APPENDIX, INFRA AT PP. 18A-19A.)

THIS COURT IN TERRY RECOGNIZED "THE . . . IMMEDIATE INTEREST OF THE POLICE OFFICER IN TAKING STEPS TO ASSURE HIMSELF THAT THE PERSON WITH WHOM HE IS DEALING IS NOT ARMED WITH A WEAPON THAT COULD UNEXPECTEDLY AND FATALLY BE USED AGAINST HIM." (Id. AT 23). THE LOGICAL BASIS OF THIS COURT'S DECISION WAS THAT IT WOULD BE CLEARLY UNREASONABLE TO REQUIRE POLICE OFFICERS TO TAKE UNNECESSARY RISKS IN THE PERFORMANCE OF THEIR DUTIES. IN FACT, THIS COURT STATED THAT THIS WAS THE CENTRAL JUSTIFICATION FOR UPHOLDING THE ENTIRE "STOP AND FRISK" PROCEDURE.

IT IS CLEAR THAT UNDER A TERRY-TYPE ANALYSIS IT IS TOTALLY REASONABLE FOR A POLICE OFFICER TO ORDER A LAWFULLY STOPPED MOTORIST FROM HIS CAR WHILE COMPLETING THE STOP. EVEN IF AN OFFICER MUST ARTICULATE REASONS TO JUSTIFY SUCH ACTION, THE STATISTICALLY PROVEN DANGERS WHICH A POLICE OFFICER FACES WHEN MAKING A TRAFFIC STOP SATISFY THIS REQUIREMENT. ALTERNATIVELY, NOTHING IN TERRY SUGGESTS THAT, ONCE A CITIZEN HAS BEEN LAWFULLY STOPPED, SOMETHING FURTHER MUST BE SHOWN TO JUSTIFY A POLICE OFFICER'S INSISTENCE THAT THE ENSUING CONFRONTATION BE FACE-TO-FACE FOR HIS OWN PROTECTION.

THE STANDARD IMPOSED BY THE FOURTH AMENDMENT IS ONE OF REASONABLENESS. SINCE ORDERING A MOTORIST FROM A CAR AFTER A LAWFUL STOP CONSTITUTES AT MOST A MINIMAL ADDITIONAL INTRUSION UPON A CITIZEN'S FREEDOM OF MOVEMENT, THE REQUEST IS CLEARLY REASONABLE, AND THUS CONSTITUTIONAL, WHEN THE INTERESTS AT ISSUE ARE BALANCED IN THE MANNER SUGGESTED IN TERRY V. OHIO, SUPRA, AND ADAMS V. WILLIAMS, SUPRA. SEE ALSO: UNITED STATES V. JOHNSON, 463 F.2D 70 (10TH CIR. 1972);



UNITED STATES V. WARE, 457 F.2D 828 (7TH CIR. 1972); UNITED STATES V. JOHNSON, 442 F.2D 1239 (D.C. CIR. 1971); CARPENTER V. SIGLER, 419 F.2D 169 (8TH CIR. 1969); UNITED STATES V. SELF, 410 F.2D 984 (10TH CIR. 1969); PEOPLE V. WOLF, 60 ILL. 230, 326 N.E.2D 766, CERT. DENIED, 423 U.S. 946 (1975).

AS WAS NOTED IN THE CONCURRING OPINION FILED IN THE PENNSYLVANIA SUPREME COURT, MIMMS:

> HAD IN FACT ALREADY BEEN 'SEIZED.' HE WAS PROPERLY DETAINED BY OFFICER KURTZ FOR A VIOLATION OF THE MOTOR VEHICLE CODE. [HIS] FREEDOM OF MOVEMENT WAS THUS LAWFULLY RESTRICTED UNTIL THE OFFICER HAD FINISHED HIS BUSINESS. REQUIRING A MOTORIST TO LEAVE HIS VEHICLE UNDER THESE CIRCUMSTANCES IS, IN MY VIEW, OF NO CONSTITUTIONAL MOMENT. THE DE MINIMUS NATURE OF THE INTRUSION IS CLEARLY OUTWEIGHED BY THE PUBLIC INTEREST IN INSURING THE SAFETY OF OUR LAW ENFORCEMENT PERSONNEL.

COMMONWEALTH V. MIMMS, SUPRA, AT 370 A.2D 1161-1162 (NIX, J. CONCURRING). SEE ALSO UNITED STATES V. BRIGNONI-PONCE, 422 U.S. 873, 95 S.CT. 2574 (1975).[6]

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6 ASSUMING ARGUENDO THAT THE OFFICER ACTED PROPERLY IN REQUIRING MIMMS TO GET OUT OF HIS CAR, IT IS CLEAR THAT THE SUBSEQUENT FRISK WAS ALSO LAWFUL. ONCE OFFICER KURTZ SAW THE SUSPICIOUS BULGE UNDER MIMMS' SPORTS COAT, REASON AND COMMON SENSE, TEMPERED WITH THE EXPERIENCE GLEANED FROM SEVEN YEARS ON THE POLICE FORCE, DEMANDED THAT A QUICK AND LIMITED SEARCH BE MADE TO DETERMINE WHETHER THE BULGE WAS CAUSED BY A WEAPON. CLEARLY, UNDER THE CIRCUMSTANCES, OFFICER KURTZ'S DECISION TO FRISK RESPONDENT WAS BOTH REASONABLE AND PROPER. TERRY V. OHIO, SUPRA.

## CONCLUSION

FOR ALL THE FOREGOING REASONS, THE COMMONWEALTH OF PENNSYLVANIA RESPECTFULLY REQUESTS THAT A WRIT OF CERTIORARI ISSUE TO REVIEW THE DECISION BELOW.

RESPECTFULLY SUBMITTED,

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## APPENDIX A

COMMONWEALTH of Pennsylvania

v.

Harry MIMMS, Appellant.

Supreme Court of Pennsylvania.

Submitted March 29, 1976.

Decided Feb. 28, 1977.

Rehearing Denied March 28, 1977.

OPINION OF THE COURT

POMEROY, Justice.

Two Philadelphia police officers stopped an automobile for the purpose of issuing a traffic summons. Upon approaching the automobile, Officer Kurtz ordered the driver, appellant Harry Mimms, to step out of the car. After Mimms had alighted from the vehicle, Officer Kurtz noticed a large bulge under Mimms' sports jacket. Fearful that the jacket might be covering a weapon, the police officer conducted a frisk of appellant's outer clothing. The frisk resulted in the discovery of a loaded .38 caliber revolver and five live rounds of ammunition. Based on this evidence appellant was indicted for carrying a concealed deadly weapon and for unlawfully carrying a firearm without a license. A motion to suppress was denied, and after a trial, at which the revolver was introduced into evidence, Mimms was convicted on both counts. The Superior Court affirmed the conviction,[1] and we granted allocatur. Because we conclude that appellant's revolver was seized in a manner which violated the Fourth Amendment to the Constitution of the United States, we reverse[2] the Superior Court and remand the case for a new trial.

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1 Commonwealth v. Mimms, 232 Pa.Super. 486, 335 A.2d 516 (1975). The Superior Court affirmed the conviction by a four to three vote; the division, however, was occasioned by another issue not here considered.

2 Because we reverse the case on this basis, it is unnecessary for us, to reach the other issues raised by appellant on this appeal. Those issues are as follows: (1) the Municipal Court of Philadelphia, not the court of common pleas, had subject matter jurisdiction over the offenses charged; (2) the trial court erred in allowing testimony from a defense witness that both he and appellant were Muslims; (3) the district attorney in his summation exceeded the bounds of permissible argument; (4) the trial judge erred when he expressed to the jury his opinion as to the credibility of witnesses.

The Fourth Amendment to the United States Constitution provides that "the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated. . . ." The broad mandate of the amendment serves to protect an individual's reasonable expectation of privacy from unjustifiable governmental intrusions. See Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed. 889 (1968); Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967); Commonwealth v. Murray, 460 Pa. 53, 331 A.2d 414 (1975). The protection thus afforded is not limited to persons in the shelter of their homes, but extends as well to the occupants of a moving vehicle. Commonwealth v. Murray, supra; Commonwealth v. Boyer, 455 Pa. 283, 314 A.2d 317 (1974); Commonwealth v. Swanger, 453 Pa. 107, 307 A.2d 875 (1973); Commonwealth v. Pollard, 450 Pa. 138, 299 A.2d 233 (1973); Commonwealth v. Dussell, 439 Pa. 392, 266 A.2d 659 (1970). The question presented is whether the governmental intrusion which occurred in this case--an order to leave the automobile and a limited search for weapons--may be justified consistently with the standards of the Fourth Amendment.[3]

The Commonwealth does not seek to justify Officer Kurtz's frisk for weapons on the ground that the traffic violation for which appellant's automobile was stopped[4] supplied probable cause to search the occupants of the vehicle. We have previously held that such a violation does not, indeed, supply justification. See Commonwealth v. Dussell, supra. Nor does the Commonwealth contend that the search was made incident to a lawful full-custody arrest based upon probable cause. See United States v. Robinson, 414 U.S. 218, 94 S.Ct. 467, 38 L.Ed. 2d 427 (1973); Gustafson v. Florida, 414 U.S. 260, 94 S.Ct. 488, 38 L. Ed.2d 456 (1973). Rather the Commonwealth asserts that the frisk was initiated only after Officer Kurtz had reasonable grounds to believe that appellant was armed and dangerous and was limited in scope to a pat-down of appellant's outer clothing. As a consequence, the Commonwealth urges,

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3
The Fourth Amendment applies to the States through the Fourteenth Amendment. Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed2d 1081 (1961).

4
The automobile was being operated with an expired license tag. The maximum penalty which could have been imposed for this offense was a fine of $10. Act of April 29, 1959, P.L. 53, §511 as amended, 75 P.S. §511.



the stop and frisk was justified under the pronouncements of the Supreme Court of the United States in Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 829 (1968)[5]

In Terry, the Supreme Court gave recognition to the fact that the exigencies of face-to-face street confrontations may require police response even when probable cause to search or to seize property or persons is lacking. See also, Adams v. Williams, 407 U.S. 143, 145, 92 S.Ct. 1921, 1922, 32 L.Ed.2d 612, 616 (1973). These exigencies may require a police officer to detain a person whom he suspects of criminal activity and to frisk the person whom he has detained when he has reasonable grounds to believe that the person is armed and dangerous. The Court in Terry acknowledged that action of this sort by the police may constitute governmental interference with an individual's reasonable expectation of privacy and that such intrusions are often made without warrants or probable cause. The Court held, nonetheless, that such "carefully limited searches" are reasonable within the meaning of the Fourth Amendment in certain narrow circumstances:

> "We merely hold today that where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited

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5
To be distinguished are cases wherein a search of a suspect's person is made incident to a full-custody arrest based upon probable cause. See United States v. Robinson, 414 U.S. 218, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973) (driver of automobile arrested by police officer having reason to believe that the vehicle was being driven after the operator's license to drive had been revoked); Gustafson v. Florida, 414 U.S. 260, 94 S.Ct. 488, 38 L.Ed.2d 456 (1973) (Semble). These decisions make it clear that "the limitations placed by Terry v. Ohio, supra, on protective searches conducted in an investigatory stop situation based on less than probable cause are not to be carried over to searches made incident to lawful custodial arrests." Gustafson v. Florida, supra, at 264, 94 S.Ct. at 491. The Commonwealth in the case before us relies on no such arrests as occurred in Robinson and Gustafson.

> search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him. Such a search is a reasonable search under the Fourth Amendment, and any weapons seized may properly be introduced in evidence against the person from whom they were taken." 392 U.S. at 30-31, 88 S.Ct. at 1884, 20 L.Ed.2d at 911.

The Court made it clear that "in justifying the particular intrusions the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from these facts, reasonably warrant the intrusion." Id. at 21, 88 S.Ct. at 1880, 20 L.Ed.2d at 906. Accord Commonwealth v. Murray, supra; Commonwealth v. Boyer, supra; Commonwealth v. Jeffries, 454 Pa. 320, 311 A.2d 914 (1973)[6]; Commonwealth v. Dussell, supra; Commonwealth v. Berrios, 437 Pa. 338, 263 A.2d 342 (1970). The question before us, then, is whether Officer Kurtz has been able to point to such "specific and articulable facts."

The precise point of our inquiry must be whether Officer Kurtz's action was justified at its inception. Terry v. Ohio, 392 U.S. at 20, 88 S.Ct. at 1879, 20 L.Ed.2d 905. Certainly the fact that a weapon was discovered as a result of the search cannot serve as its justification. See, e.g., Sibron v. New York, 392 U.S. 40, 63, 88 S.Ct. 1889, 1902, 20 L.Ed.2d 917, 934 (1968). Even were we to assume that the observable bulge under Mimms' coat justified a limited search for weapons, our inquiry would still not be at an end. The initiation of Officer Kurtz's intrusive action was the order to appellant to get out of his car. If that order cannot be constitutionally justified, then the fruits of the resulting frisk were likewise unconstitutionally obtained.

In Commonwealth v. Pollard, 450 Pa. 138, 299 A.2d 233 (1973) this Court held that the police had no right to order a passenger out of an automobile after the police had stopped it for going through a red light; although the infraction occurred in a "high crime" area, the police could point to no objective observable facts to support a suspicion that criminal activity was afoot or that the occupants of the vehicle posed a threat to police safety. Similarly in the instant case, Officer Kurtz could point to no such observable facts. He testified that he did not see the bulge under appellant's coat until after appellant had stepped out of the car, and that there was nothing unusual or suspicious about the behavior of Mimms or his passenger which led Kurtz to issue his order. Rather, the officer indicated that it is his practice to order all drivers out of their vehicles whenever he makes a stop for a traffic violation and that the order was issued to appellant solely because of this practice.

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6 The dissenting opinion of this writer in Jeffries did not disagree with the Court's statements concerning the law, but with the application of the law to the facts of that case. 454 Pa. at 328, 311 A.2d 914 (dissenting opinion of Pomeroy, J.).



We are not unsympathetic to the plight of the police officer who must approach potentially dangerous people in the daily enforcement of our traffic laws. The Fourth Amendment, however, mandates that invasions of the personal liberties of the occupants of motor vehicles be justified by a reasonable appraisal of the objective facts of the given situation. "Anything less would invite intrusion upon constitutionally guaranteed rights based on nothing more substantial than inarticulable hunches." Terry v. Ohio, 392 U.S. at 22, 88 S.Ct. at 1880, 20 L.Ed.2d at 906. In the case at bar, the stop and frisk in question was not initiated on the basis of an objective appraisal of the given circumstance but rather on a policy of ordering all drivers stopped for traffic violations out of their vehicles. Such an indiscriminate procedure violates the Fourth Amendment and the fruits obtained as a result thereof may not properly be used at trial against the accused. Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

The order of the Superior Court is reversed and the case remanded for a new trial.

NIX, J., filed a concurring opinion in which O'BRIEN, J., joins.

JONES, C. J., dissents.

NIX, Justice, concurring.

While I believe that the judgment of sentence in this matter must be reversed and a new trial awarded, my reasons for reaching this result differ from the majority. I cannot agree that Officer Kurtz's direction to appellant that he alight from his vehicle was such an arbitrary and unreasonable invasion of appellant's liberty as to violate the fourth amendment.

The requirements of the fourth amendment applicable to the instant case were set forth most recently by the United States Supreme Court in United States v. Brignoni-Ponce, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975).

> "The Fourth Amendment applies to all seizures of the person, including seizures that involve only a brief detention short of traditional arrest. Davis v. Mississippi, 394 U.S. 721, 89 S.Ct. 1394, 22 L.Ed.2d 676 (1969); Terry v. Ohio, 392 U.S. 1, 16-19, 88 S.Ct. 1868, 1877, 20 L.Ed.2d 889 (1968). "[W]henever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person," Terry v. Ohio, supra, at 16, 88 S.Ct. [1868] at 1877, and the Fourth Amendment requires that the seizure be "reasonable." As with other categories of police action subject to Fourth Amendment constraints, the reasonableness of such seizures depends on a balance between the public interest, and the individual's right to personal security free from arbitrary interference by law officers. Terry v. Ohio, supra, at 20-21, 88 S.Ct. [1868] at 1879; Camara v. Municipal Court, 387 U.S. 523, 536-37, 87 S.Ct. 1727, 1734, 18 L.Ed.2d 930 (1967)." Id. at 878, 95 S.Ct. at 2578 (emphasis added).

The application of this balancing test to the instant facts yields the conclusion that Officer Kurtz's action was reasonable. The intrusion occasioned by requiring appellant to step out of the vehicle was minimal. Appellant had in fact already been "seized". He was properly detained by Officer Kurtz for a violation of the Motor Vehicle Code. Appellant's freedom of movement was thus lawfully restricted until the officer had finished his business. Requiring a motorist to leave his vehicle under these circumstances is, in my view, of no constitutional moment.[1] The de minimus

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1 The majority's reliance on Commonwealth v. Pollard, 450 Pa. 138, 299 A.2d 233 (1973), is tenuous at best.
(Footnote continued on next page)



nature of the intrusion is clearly outweighed by the public interest in insuring the safety of our law enforcement personnel.[2]

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(Footnote 1 continued)
Our holding in that case was clearly limited to passengers occupying a vehicle. ("Further, as was previously noted, appellant was not the driver of the automobile." Id. at 142, 299 A.2d at 235.) The majority in the case at bar ignores this distinction, and thus completely overlooks the question left open in Pollard of whether an operator's expectation of privacy differs from that of an occupant of a vehicle detained for a traffic violation. Cf. United States v. Johnson, 463 F.2d 70 (10th Cir. 1972); Carpenter v. Sigler, 419 F.2d 169 (8th Cir. 1969).

In People v. Wolf, 60 Ill. 230, 326 N.E.2d 766, cert. denied, 423 U.S. 946, 96 S.Ct. 361, 46 L.Ed.2d 280 (1975), the Supreme Court of Illinois upheld the introduction of evidence obtained by a state police officer when he opened the driver's door to inspect the serial number of a "suspicious" vehicle detained because its license plate was fastened on with wire. The court sustained the officer's action in opening the door as reasonable and not inconsistent with the fourth amendment on the ground that the intrusion was minimal. See also United States v. Ware, 457 F.2d 828 (7th Cir. 1972); United States v. Self, 410 F.2d 984 (10th Cir. 1969). In the case at bar, the vehicle was detained for having an expired license plate. Presumably, Officer Kurtz would have been justified in opening appellant's door to inspect the vehicle identification number. In my view, the difference, if any, in the "degree of intrusion" occasioned by this type of conduct and that instantly held invalid is constitutionally insignificant.

2 Risks incurred by officers required to approach parked vehicles were noted by the United States Supreme Court in Adams v. Williams, 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972).

> Figures reported by the Federal Bureau of Investigation indicate that 125 policemen were murdered in 1971, with all but five of them having been killed by gunshot wounds. Federal Bureau of Investigation Law Enforcement Bulletin, February 1972, p. 33. According to one study, approximately 30% of police shootings occurred when a police officer approached a suspect seated in an automobile. Bristow, Police Officer Shootings--A Tactical Evaluation, 54 J.Crim.L.C. & P.S. (1963). Id. at 148-149 n. 3, 92 S.Ct. at 1924.

I would thus hold that when appellant alighted from the car, pursuant to the officer's instructions, the limited search for weapons was justified by the observable bulge under appellant's jacket. See Terry v. Ohio, supra.

I join my brethren, however, in remanding this matter for a new trial because I believe the trial judge erred in permitting the Assistant District Attorney to cross-examine a defense witness concerning the witness' and the appellant's religious affiliations.

Clayton Morrison, a passenger in the vehicle at the time of appellant's arrest,[3] testified for the defense that he and not appellant had brought the revolver into the vehicle, and that it was found not on appellant, but under the car seat. On cross-examination, the Assistant District Attorney questioned the witness as to his and Morrison's religious affiliations as follows:

"Q. Tell me, are you a good friend of Harry Mimms?

"A. I am an acquaintance of him, I know him.

"Q. You know him very well would you say?

"A. Yes, sir.

"Q. Are you both Muslims?

"A. Sir?

"Objection: Sir, I move for withdrawal of a juror.

"THE COURT: Overruled.

"Q. Are you both Muslims?

"A. Yes, sir.

"Q. In other words, when you say 'Muslims', followers of the Islam faith is that right?

"A. Yes."

Appellant's religious affiliations were never mentioned during direct examination. The Commonwealth does not contend that

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[3] Prior to appellant's trial, Morrison had pled guilty to charges of violation of the Uniform Firearms Act and carrying a concealed deadly weapon.



the questions were relevant to any factual matter at issue during the trial,[4] but argues that the testimony was introduced to show the witness' relationship to the appellant and put his credibility in issue. However, our legislature has provided that:

> "[n]o witness shall be questioned, in any judicial proceeding, concerning his religious belief; nor shall any evidence be heard upon the subject, for the purpose of affecting either his competency or credibility." Act of April 23, 1909, P.L. 140, §3, 28 P.S. §313 (1958) (emphasis added).

We have stated that no verdict which may have been brought about or even influenced by a litigant's religious affiliations should be permitted in a court of justice. O'Donnell v. Philadelphia Record Co., 356 Pa. 307, 346-47 n.5, 51 A.2d 775, 793-94 n.5, cert. denied, 332 U.S. 766, 68 S.Ct. 74, 92 L.Ed. 351 (1947). This is particularly so where, as here, the religious affiliation placed before the jury is that of a highly controversial and extensively publicized group like the Black Muslims. The potentially prejudicial impact of such testimony is obvious, and its use by the Commonwealth in its attempt to impeach Morrison was error, requiring a new trial.

Accordingly, I concur in the judgment of the Court granting appellant a new trial.

O'BRIEN, J., joins in this concurring opinion.

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[4] In McKim v. Philadelphia Transportation Co., 364 Pa. 237, 72 A.2d 122 (1950), this Court permitted questions concerning a litigant's religious affiliation where it was alleged that her injuries had prevented her from performing her duties as a minister of the Jehovah's Witnesses. The questions were thus permitted to obtain "substantive information", and not for the purpose of impeachment.

APPENDIX B

# Supreme Court of Pennsylvania

## Eastern District

SALLY MRVOS
PROTHONOTARY
LAURA E. LITCHARD
DEPUTY PROTHONOTARY

PHILADELPHIA, 19107

March 31, 1977

RECEIVED
APR 1 7
ATTORNEY GENERAL

Michael R. Stiles, Esq.
Assistant District Attorney
Chief, Appeals Division
2300 Centre Square West
Philadelphia, Pa. 19102

Re: Commonwealth of Pennsylvania v.
Harry Mimms, Appellant
No. 45, January Term, 1976

Dear Mr. Stiles:

This is to advise that the following Order has been endorsed on the Application for Reargument filed in the above captioned matter:

"Petition denied this 28th day of March, 1977.

s/ Per Curiam."

Very truly yours,

Laura E. Litchard

Deputy Prothonotary

LEL/c

cc: Burton Spear, Esq.
West Publishing Company
Submitted 3/29/76 - J-159
Decision - 2/28/77



APPENDIX C

COMMONWEALTH V. MIMMS, APPELLANT.

Superior Court of Pennsylvania

OPINION BY WATKINS, P. J., March 31, 1975:

This is an appeal from the judgment of sentence of the Court of Common Pleas of Philadelphia County, Criminal Division, by the defendant-appellant, Harry Mimms, after conviction by a jury of violation of the Uniform Firearms Act and Carrying a Concealed Deadly Weapon. Post-trial motions were denied and the appellant was sentenced to 1 1/2 to 3 years imprisonment.

The case was commenced by arrest and complaint on September 7, 1970, and a preliminary hearing was subsequently held on September 16, 1970. Since the maximum penalty which could be imposed on Carrying a Concealed Deadly Weapon and violation of the Uniform Firearms Act charges was four (4) years and the jurisdiction of the Municipal Court, at that time, was limited to cases punishable by no more than two (2) years, the case fell within the jurisdiction of the Court of Common Pleas. So accordingly, the case against the appellant was presented to the Grand Jury where indictments were returned. Pennsylvania Constitution, Article 5, Schedule 16 (r) (iii).

As amended by Act No. 45 of 1971 Sessions, affirmed July 14, 1971, Article 5 and its schedule were amended to broaden the jurisdiction of the Municipal Court to hear cases where the maximum sentence was five (5) years or less. 1969, October 17, P.L. 259, §18, as amended 1971, July 14, P.L. 224, No. 45, §1, 17 P.S. §711.18.

On October 19, 1971, the President Judge of the Court of Common Pleas (a) gave the Municipal Court exclusive jurisdiction over a certain class of cases where the maximum possible sentence was five (5) years or less and (b) established by regulation procedure whereby a case could be certified from the Municipal Court for trial initially in Common Pleas. General Court Regulation No. 71-16. There is nothing in the July, 1971 Amendment or in the Court regulation that would permit any case to be heard in Municipal Court in which a Grand Jury indictment had been returned based on the original jurisdiction.

At trial, two police officers testifed that on or about 9 A.M. on September 7, 1970, while on patrol, they observed the appellant driving west on Baltimore Avenue with an expired license plate. The officers stopped the car to issue a traffic summons. The appellant was asked to step out of the automobile and produce his owner's card and operator's license. The officers noticed a large bulge on the appellant's hip under his sport jacket. The officer feared a concealed deadly weapon and frisked the appellant and took from his waistband a .38 caliber revolver with five live rounds. The other occupant of the automobile was also frisked and a .32 caliber revolver was removed from his person.

The appellant contends that the search of his person and the seizure of the revolver violated his constitutional rights.

The Supreme Court of the United States in Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), at page 27 held:

> "Our evaluation of the proper balance that has to be struck in this type of case leads us to conclude that there must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime. The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger. (Citations omitted) And in determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate, and unparticularized suspicion or 'hunch', but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience."

What the Court was actually saying was not "what a reasonably prudent man in the circumstances would be warranted in the belief that his safety ... is in danger", but rather, what a reasonably prudent police officer would be warranted to believe, otherwise police experience referred to in the above citation would have no bearing. Either test could be properly applied in the instant case.

As a general proposition the arrest of the driver of an automobile for an ordinary traffic offense does not, without more, permit a warrantless search of an automobile. Commonwealth v. Dussell, 439 Pa. 392, 266 A. 2d 659 (1970), but when, as in the instant case, a police officer in the performance of his duty stops a car to enforce a traffic violation for failure to have a current license tag, and when requesting the driver to step out of the car and exhibit his owner's card and driver's license, he becomes aware of a situation that may prove dangerous to his person, his right to frisk to remove the danger, arises.

The Commonwealth concedes that the only reason the car was stopped was the absence of a current license plate. However, the subsequent search and frisk of the person was not the subject of an ill-founded hunch or whimsical on the part of the officer as the appellant contends, nor did the search constitute harrassment in any sense. The narrow basis of the frisk or search was strictly and solely for the officers' own



protection. Such searches are encouraged by the Supreme Court of the United States for the protection of law enforcement officers. Terry v. Ohio, supra; Adams v. Williams, 407 U.S. 143, 92 S. Ct. 1921, 32 L. Ed. 2d 612 (1972).

Frightening statistics form the foundation for the authorization of self-protective searches by police officers:

> "Figures reported by the Federal Bureau of Investigation indicate that 125 policemen were murdered in 1971, with all but five of them having been killed by gunshot wounds. Federal Bureau of Investigation Law Enforcement Bulletin, Feb., 1972, p. 33. According to one study, approximately 30% of police shootings occurred when a police officer approached a suspect seated in an automobile. Bristo, Police Officer Shootings--A Tactical Evaluation, 54 J. Crim. L.C. & P.S. 93 (1963)." Id. at 148-149, n. 3.

The appellant contends that a question asked concerning his religious background was fundamental error. This occurred on cross-examination and was as follows:

> "Q. Tell me, are you a good friend of Harry Mimms?
>
> "A. I am an acquaintance of him, I know him.
>
> "Q. You know him very well would you say?
>
> "A. Yes, sir.
>
> "Q. Are you both Muslims?
>
> "A. Sir?
>
> "Objection: Sir, I move for withdrawal of a juror.
>
> "THE COURT: Overruled.
>
> "Q. Are you both Muslims?
>
> "A. Yes, sir.
>
> "Q. In other words, when you say 'Muslims', followers of the Islam faith is that right?
>
> "A. Yes."

Clayton Morrison who so testified was the only witness called by the appellant on his behalf. This questioning was designed to show bias in favor of the appellant in that they were close friends and members of the same religious sect. The defendant took advantage of this fact to have the point made that adherents of the sect have an obligation to testify truthfully. The contention is without merit.

The charge was as a whole fair and impartial P.L.E., Criminal Law, §721.7. The Court reviewed the testimony on both sides and the appellant complains about an isolated statement concerning credibility of the police. But the Court went on to say: "On the other hand, you may say that they had no reason, that they just wanted to say that he did it. Or they found two guns in the car and they thought it was easier to say that he had a gun on him than to say they found them under the dashboard. In any event, members of the jury, it is for you to say. And you just say by unanimous verdict." The appellant contended that the gun was found in the car, while the police testified that they took the gun from his person. It is evident that the jury believed the testimony of the Commonwealth.

Judgment of sentence affirmed.

DISSENTING OPINION BY HOFFMAN, J.:

Appellant contends that the lower court erred in allowing a defense witness to testify, on cross-examination, that both he and appellant were of the Muslim faith.

At approximately 9 a.m. on September 7, 1970, Philadelphia police officers John Kurtz and Lester Milby observed appellant driving west on Baltimore Avenue in an automobile bearing an expired license tag. The officers stopped the car in order to issue a summons. Officer Kurtz asked the appellant to step out of his car. Officer Kurtz testified that when appellant stepped out of the car, he noticed a large bulge on appellant's hip under his jacket. He then frisked appellant, and seized a loaded .38 caliber revolver from appellant's waistband. Officer Milby testified that he then frisked appellant's passenger, Clayton Morrison, and found a .32 caliber revolver.[1]

At trial in the Philadelphia Common Pleas Court, both appellant and Morrison testified as defense witnesses, and maintained that Morrison had brought both revolvers into the car. Morrison testified that the .38 revolver had been under the car seat, and not on appellant's person, at the time of the stop.

On March 15, 1972, a jury found appellant guilty of a violation of the Uniform Firearms Act[2] and carrying a

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1
Prior to appellant's trial, Morrison had pleaded guilty to charges of violation of the Uniform Firearms Act and carrying a concealed deadly weapon.

2
Act of June 24, 1939, P.L. 872, §628, as amended; former 18 P.S. §4628, repealed by the Act of December 6, 1972, P.L. 1482, No. 334, §5(a), effective June 6, 1973; substantially reenacted by the Act of December 6, 1972, supra, §1, 18 Pa. C.S. §§6101 through 6119.



concealed deadly weapon.[3] Post-trial motions were denied; this appeal followed.

On cross-examination the Assistant District Attorney was allowed to ask Morrison the following questions:

"Q. Tell me, are you a good friend of Harry Mimms?

"A. Yes, sir.

"Q. You know him very well, would you say?

"A. Yes, sir.

"Q. Are you both Muslims?

"A. Sir?

[Counsel for appellant]:

"Objection, sir. I move for withdrawal of a juror.

"THE COURT: Overruled.

[By the Assistant District Attorney]:

"Q. Are you both Muslims?

"A. Yes, sir.

"Q. In other words, when you say 'Muslims,' followers of the Islam faith, is that right?

"A. Yes."

In Pennsylvania, the legislature has specifically provided that "[n]o witness shall be questioned, in any judicial proceeding, concerning his religious belief; nor shall any evidence be heard upon the subject, for the purpose of affecting either his competency or credibility." Act of April 23, 1909, P.L. 140, §3, 28 P.S. §313.[4] Here, the

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3
Act of June 24, 1939, supra, n. 2, §416, as most recently amended February 25, 1972, P.L. 79, No. 27, §1, 18 P.S. §4416; repealed by the Act of December 6, 1972, supra, n. 2, §5(a), effective June 6, 1973; superseded by the Act of December 6, 1972, supra n. 2, §1, 18 Pa.C.S. §§907 908.

4
Pennsylvania's statute had been described as "a model of clarity" which "settles most of the questions left unsettled
(Footnote continued on next page)

Commonwealth was clearly using the common religious affiliation of appellant and Morrison as a means of impeaching Morrison's credibility. Indeed, the lower court states in its opinion that the testimony was introduced "to show the witness' relationship with the defendant and put his credibility in issue." (Emphasis supplied.)

Evidence concerning the religious beliefs of witnesses can be admitted only where its relevance to the issues of the case is so great as to outweigh any possibility of prejudice.[5] Thus, in McKim v. Philadelphia Transportation Co., 364 Pa. 237, 72 A. 2d 122 (1950), three plaintiffs in a personal injury action had specifically alleged in their complaints that their injuries had prevented them from performing their duties as ministers. On direct examination, one of the plaintiffs testified that she received an expense allowance when she was able to perform a certain amount of work as a minister of the Jehovah's Witnesses. On cross-examination, however, the plaintiffs objected to all questions concerning the circumstances of their ordination or the duties which they performed as ministers. The lower court overruled these objections and the Supreme Court affirmed, noting that "[t]he purpose [of the questions objected to] was to obtain substantive information necessary to supply deficiencies in the testimony given by plaintiffs in direct examination; if the answers to these questions, properly allowed in cross-examination, played any part in judging credibility, that effect was incidental ...." 364 Pa. at 241, 72 A. 2d at 123. The Court added that "[i]f the purpose of the cross-examination had apparently been to create prejudice against the parties because of their religious beliefs, the learned trial judge would undoubtedly have sustained the objections." 364 Pa. at 241, 72 A. 2d at 123-124.

Here, the religious beliefs of appellant and his witness were completely irrelevant to any issue involved in the trial. They were never mentioned or alluded to anywhere on direct examination.[6] If the Commonwealth wished only to

(Footnote 4 continued)
in other states . . ." McCormick, Handbook of the Law of Evidence, §48 at 102 (2d ed. E. Cleary 1972). The various state statutes are collected and discussed in 3A Wigmore, Evidence §936 (Chadbourn rev. 1970).

5
See McCormick, Handbook of the Law of Evidence, supra, n. 4, §48 at 101.

6
The fact that defense counsel on redirect examination had Morrison testify that Muslims were under an obligation to
(Footnote continued on next page)



demonstrate appellant's friendship with Morrison, it could have done so without invading the privileged area of religion. Instead, it appears that the Commonwealth deliberately sought to place before the jury the fact that appellant and the only other defense witness belonged to a highly controversial religious group.

The blatant means by which the religious affiliation of appellant and his witness have been injected into this case bring to mind the words of former Chief Justice MAXEY in O'Donnell v. Philadelphia Record Co., 356 Pa. 307, 346-347, n. 5, 51 A. 2d 775, 793-794, n. 5 (1947) (dissenting opinion), cert. denied, 332 U.S. 766: "This is the first time the writer ever heard of any attorney injecting into a case the religious affiliations of either a litigant or a witness .... If a witness' religious belief cannot properly be injected into a judicial proceeding, a litigant's religious belief certainly cannot be .... When plaintiff's counsel asked [defendant's chief executive] as to his knowledge of O'Donnell's religious affiliation and stated that affiliation, the trial judge should have immediately declared a mistrial. No verdict which may have been brought about, or even influenced by a consideration of a litigant's religious affiliations should be allowed to stand in a court of justice." (Emphasis in original.)[7]

As appellant's trial turned solely on the credibility of himself and his witness, and as their credibility was improperly impeached on religious ground contrary to the letter and intent of the Act of April 23, 1909, supra, I believe that appellant must be granted a new trial.

JACOBS and SPAETH, JJ., join in this dissenting opinion.

(Footnote 6 continued)
tell the truth could hardly amount to an opening of the door on the issue of religion. The Commonwealth introduced the issue of religion only after the defense had completed its last direct examination, and defense counsel's question on redirect, after his motion for a mistrial had been denied, was only an attempt to minimize the effects of the Commonwealth's improper cross-examination.

7
Justices STERN and PATTERSON concurred in this dissent. The Majority in O'Donnell did not discuss this issue, perhaps because it had not been specifically raised on appeal as an assignment of error.

APPENDIX D

# CITY OF PHILADELPHIA

POLICE DEPARTMENT
HEADQUARTERS, FRANKLIN SQUARE
PHILADELPHIA, PENNSYLVANIA 19106

JOSEPH F. O'NEILL
Commissioner

Rm. 212

May 11, 1977

Mr. Mark Sendrow
Assistant District Attorney
2300 Centre Square West
Philadelphia, Pa. 19102

Dear Mark:

In reply to your request, attached please find statistics indicating the number of incidents in which police were assaulted during the course of conducting vehicle investigations in Philadelphia during 1976 as well as the first three months of 1977.

Also, the importance of the traffic investigation stop from the view of the police officer's safety was outlined in your original brief, which indicated the number of law enforcement officers killed in recent years conducting car stops, also indicates the critical need for limited search approaches.

If you need any additional data please call upon me.

Sincerely,

James Herron

JAMES C. HERRON
Chief Inspector
Staff Services Bureau

JCH:bl

Attach.





## ASSAULTS ON POLICE

## VEHICLE INVESTIGATION AS ASSAULTS

| | ANNUAL 1976 | | | 1ST THREE MONTHS 1977 | | |
|---|---|---|---|---|---|---|
| | A. Total Assaults Reported | B. Vehicle Investigations Only | C. Percentage B of A (%) | A. Total Assaults Reported | B. Vehicle Investigations Only | C. Percentage B of A (%) |
| January | 179 | 14 | 7.8% | 151 | 15 | 9.9 |
| February | 226 | 29 | 12.8% | 161 | 21 | 13.0 |
| March | 192 | 17 | 8.9% | 211 | 26 | 12.3 |
| April | 170 | 20 | 11.8% | | | |
| May | 184 | 13 | 7.1% | | | |
| June | 266 | 17 | 6.4% | | | |
| July | 219 | 12 | 5.5% | | | |
| August | 153 | 3 | 2.0% | | | |
| September | 178 | 11 | 6.2% | | | |
| October | 215 | 5 | 2.3% | | | |
| November | 193 | 18 | 9.3% | | | |
| December | 172 | 10 | 5.8% | | | |
| Totals: | 2347 | 169 | 7.2% | 523 | 62 | 11.9 |

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976
NO. 76-1830

COMMONWEALTH OF PENNSYLVANIA,
PETITIONER

v.

HARRY MIMMS,
RESPONDENT

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# PETITIONER'S REPLY MEMORANDUM

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GAELE McLAUGHLIN BARTHOLD
ASSISTANT DISTRICT ATTORNEY

MARK SENDROW
CHIEF, MOTIONS DIVISION

STEVEN H. GOLDBLATT
DEPUTY DISTRICT ATTORNEY FOR LAW

F. EMMETT FITZPATRICK
DISTRICT ATTORNEY

2400 CENTRE SQUARE WEST
PHILADELPHIA, PENNSYLVANIA 19102

## INDEX





## TABLE OF CITATIONS

## TABLE OF CITATIONS

(CONTINUED)





## I. AN ACTUAL CASE OR CONTROVERSY IS PRESENTED BY THE INSTANT CASE. THE MERE FACT THAT RESPONDENT HAS COMPLETED THE MAXIMUM SENTENCE IMPOSED UPON HIM DOES NOT WARRANT INVOCATION OF THE MOOTNESS DOCTRINE.

IN HIS BRIEF OPPOSING CERTIORARI RESPONDENT ARGUES THAT THE INSTANT CASE IS NOT JUSTICIABLE AS A CONSEQUENCE OF HIS COMPLETION OF THE THREE YEAR PRISON SENTENCE IMPOSED. HIS RELIANCE UPON ST. PIERRE V. UNITED STATES, 319 U.S. 41, 63 S.CT. 910 (1943), AS AUTHORITY FOR THIS PROPOSITION, IS ERRONEOUS.[1] IT IGNORES THE PRACTICAL BASIS OF THE "CASE OR CONTROVERSY" REQUIREMENT, AS WELL AS THE NUMEROUS SUBSEQUENT DECISIONS OF THIS COURT WHICH DEPART FROM THE RULE ANNOUNCED IN ST. PIERRE, SUPRA, AND WHICH HOLD THAT THE MERE POSSIBILITY OF A DEFENDANT SUFFERING COLLATERAL LEGAL CONSEQUENCES FORECLOSES APPLICATION OF THE MOOTNESS DOCTRINE. STREET V. NEW YORK, 394 U.S. 576, 89 S.CT. 1354 (1969); SIBRON V. NEW YORK, 392 U.S. 40, 88 S. CT. 1889 (1968); CARAFAS V. LA VALLEE, 391 U.S. 234, 88 S.CT. 1556 (1968); GINSBERG V. NEW YORK, 390 U.S. 629, 88 S.CT. 1274 (1968); SEE ALSO BENTON V. MARYLAND, 395 U.S. 784, 89 S.CT. 2056 (1969).

RECOGNITION OF A DEFENDANT'S RIGHT TO REVIEW UNDER THE CIRCUMSTANCES CONSIDERED IN THE FOREGOING CASES NECESSARILY PRESUMES A CORRELATIVE PROSECUTORIAL RIGHT TO REVIEW WITHOUT

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1. NEITHER ARE THE OTHER AUTHORITIES WHICH ARE RELIED UPON BY RESPONDENT PERSUASIVE. IN UNITED STATES V. MUNSINGWEAR, 340 U.S. 36, 71 S.CT. 104 (1950), A DISMISSAL ON ACCOUNT OF MOOTNESS WAS AFFIRMED AS A CONSEQUENCE OF THE PRINCIPLE OF RES JUDICATA. S.E.C. V. MEDICAL COMMITTEE FOR HUMAN RIGHTS, 404 U.S. 403, 92 S.CT. 577 (1972), WHICH ARTICULATES GENERAL PRINCIPLES GOVERNING MOOTNESS, IS IRRELEVANT WITHIN THE PARTICULARIZED CONTEXT OF THIS CRIMINAL PROSECUTION.

REGARD TO THE MOOTNESS DOCTRINE. THAT DOCTRINE IS EXPRESSIVE OF THE NEED FOR ANTAGONISTIC LITIGANTS WHO WILL ADVANCE VIGOROUS ARGUMENTS TO PROTECT SUBSTANTIVE RIGHTS AND THUS SHARPEN THE ISSUES PRESENTED. SEE JACOBS V. NEW YORK, 388 U.S. 491, 87 S.CT. 2098, DISSENTING OPINION BY MR. JUSTICE DOUGLAS (1967); SEE ALSO NORTH CAROLINA V. RICE, 404 U.S. 244, 92 S.CT. 402 (1971). THE REVIEW OF ANY CRIMINAL CONVICTION PRESUPPOSES AN ADVERSARIAL SITUATION WHICH WILL AFFECT THE RIGHTS OF BOTH LITIGANTS. THE INTEREST OF THE PROSECUTION, IN PRESERVING THE INTEGRITY OF A CONVICTION, IS NO LESS SIGNIFICANT THAN THE INTEREST OF THE DEFENDANT IN SECURING THE BENEFITS WHICH FLOW FROM A NULLIFICATION OF THAT CONVICTION. RESPONDENT'S CONVICTION WOULD BE RELEVANT, INTER ALIA, TO QUESTIONS OF BAIL AND SENTENCE IN ANY SUBSEQUENT STATE CRIMINAL PROCEEDINGS AGAINST HIM. 18 C.P.S.A. §§1322, 1331, 1332; PA. R. CRIM. P. 4004. SUBSTANTIAL STATE INTERESTS ARE, THEREFORE, AT STAKE AND THE DOCTRINE OF MOOTNESS SHOULD NOT FORECLOSE THIS COURT FROM REVIEWING THE PENNSYLVANIA SUPREME COURT'S REVERSAL OF RESPONDENT'S CONVICTION.[2]

MOREOVER, INVOCATION OF THE DOCTRINE OF MOOTNESS IN CASES SUCH AS THE PRESENT CASE, WHERE A DEFENDANT'S SENTENCE HAS EXPIRED AND THE PROSECUTION PETITIONS FOR REVIEW BY THIS COURT, WOULD CREATE INEQUALITIES DETRIMENTAL TO BOTH PUBLIC AND STATE INTERESTS. IT WOULD ALLOW CERTAIN DEFENDANTS, UNDER THE AUTHORITY OF SIBRON, SUPRA, TO OBTAIN REVIEW OF FEDERAL CONSTITUTIONAL QUESTIONS, BUT FORECLOSE CONSIDERATION OF THE SAME ISSUES IF REVIEW IS REQUESTED BY THE STATE.[3] THE POSSIBILITY THAT AN ADVERSELY AFFECTED PARTY MAY BE PRECLUDED FROM SEEKING REVIEW BY THIS COURT, OF A STATE COURT DETERMINATION BASED ON FEDERAL CONSTITUTIONAL GROUNDS, IS A FACTOR WHICH HAS BEEN CONSIDERED CRITICAL BY THIS COURT IN DETERMINING THE EXISTENCE OF A "CASE OR CONTROVERSY." RICHARDSON V. RAMIREZ, 418 U.S. 24, F.N. 13 AT 40-41, 94 S.CT. 2655, F.N. 13 AT 2665 (1974). THE DOCTRINE OF MOOTNESS IS, THEREFORE, INAPPLICABLE.

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[2] THE PUBLIC INTEREST WOULD FURTHER SUFFER IF, AS A CONSEQUENCE OF THE REVERSAL OF THE CONVICTION PRESENTLY AT ISSUE, RESPONDENT WERE TO ACHIEVE ON A 28 U.S.C.A. §2255 MOTION, REDUCTION OF THE FEDERAL SENTENCE HE IS CURRENTLY SERVING. SEE COUNTS V. UNITED STATES, 527 F.2D 542 (2ND CIR. 1975), CERT. DENIED, 426 U.S. 923, 96 S.CT. 2632 (1976); UNITED STATES V. DORMAN, 496 F.2D 438 (4TH CIR. 1974), CERT. DENIED, 419 U.S. 945, 95 S.CT. 214 (1974).

[3] ADDITIONALLY, IT WOULD ALLOW CERTAIN DEFENDANTS, SUCH AS RESPONDENT HERE ATTEMPTS TO DO, TO REQUEST APPELLATE REVIEW AND THEN TERMINATE THE LITIGATION UPON ACHIEVING A FAVORABLE RESULT.

II. WHERE THE PENNSYLVANIA SUPREME COURT CLEARLY BASED ITS HOLDING IN THE INSTANT CASE UPON THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION, NO REMAND IS NECESSARY, AS RESPONDENT SUGGESTS, TO DETERMINE THE BASIS FOR THE JUDGMENT.

ALTERNATELY, RESPONDENT ARGUES THAT A REMAND IS NECESSARY TO DETERMINE WHETHER THE HOLDING OF THE PENNSYLVANIA SUPREME COURT WAS BASED UPON ADEQUATE AND INDEPENDENT STATE GROUNDS. HIS SUGGESTION THAT THE BASIS OF THE STATE COURT'S JUDGMENT IS UNCLEAR IS BELIED BY LANGUAGE EMPLOYED BY THE COURT IN ANNOUNCING THE DECISION. MR. JUSTICE POMEROY, SPEAKING FOR THE COURT, NOT ONLY STATED THAT:

> THE QUESTION PRESENTED IS WHETHER THE GOVERNMENTAL INTRUSION WHICH OCCURRED IN THIS CASE--AN ORDER TO LEAVE THE AUTOMOBILE AND A LIMITED SEARCH FOR WEAPONS--MAY BE JUSTIFIED CONSISTENTLY WITH THE STANDARDS OF THE FOURTH AMENDMENT[,]

BUT ALSO SPECIFICALLY ANNOUNCED THAT THE ORDER OF THE PENNSYLVANIA SUPERIOR COURT WAS REVERSED BECAUSE:

> WE CONCLUDE THAT APPELLANT'S REVOLVER WAS SEIZED IN A MANNER WHICH VIOLATED THE FOURTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES[.]

COMMONWEALTH V. MIMMS, ___ PA. ___, 370 A.2D 1157, 1159, 1158 (1977); PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA, 2A, 1A (CITATION OMITTED).

RESPONDENT'S SUGGESTION THAT THE PENNSYLVANIA SUPREME COURT'S CITATION OF PENNSYLVANIA AUTHORITY CREATES DOUBT ABOUT THE BASIS OF THE COURT'S DECISION, DESPITE THE PLAIN LANGUAGE OF THE OPINION, HAS NO SUBSTANTIAL BASIS. AN EXAMINATION OF



THE CASES RELIED UPON BY THE COURT CONCLUSIVELY DEMONSTRATES THAT THEY TOO WERE BASED ON FEDERAL CONSTITUTIONAL (FOURTH AMENDMENT) GROUNDS.[4] MOREOVER, THE MERE POSSIBILITY THAT THE CONCLUSION REACHED BY THE PENNSYLVANIA SUPREME COURT MIGHT ALSO HAVE BEEN REACHED AS A MATTER OF STATE LAW DOES NOT CREATE AN ADEQUATE AND INDEPENDENT STATE GROUND WHICH WARRANTS DISMISSAL OF THE PETITION. UNITED AIR LINES V. MAHIR, 410 U.S. 623, 630-631, 93 S.CT. 1186, 1191 (1973).

FOR THE SAME REASON, THE COINCIDENTAL EXISTENCE, IN ARTICLE I, SECTION 8 OF THE PENNSYLVANIA CONSTITUTION, OF A PROVISION EQUIVALENT TO THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION, IS IMMATERIAL. THIS PROVISION WAS NEITHER REFERRED TO OR RELIED UPON BY THE PENNSYLVANIA SUPREME COURT. THERE IS NO AMBIGUITY AS TO THE BASIS OF THE PENNSYLVANIA SUPREME COURT'S DECISION; ITS LANGUAGE IS CLEAR. IT IS PERHAPS NOTEWORTHY THAT MR. JUSTICE POMEROY, WHO AUTHORED MIMMS, HAS EXPRESSED DISSATISFACTION WITH THE PENNSYLVANIA SUPREME COURT FOR RELYING UPON ITS SUPERVISORY POWERS, AFTER A REMAND BY THIS COURT, BECAUSE SUCH RELIANCE:

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[4] SEE COMMONWEALTH V. MURRAY, 460 PA. 53, 59-60, 331 A.2D 414 (1975); COMMONWEALTH V. BOYER, 455 PA. 283, 286, 314 A.2D 317 (1974); COMMONWEALTH V. JEFFRIES, 454 PA. 320, 322, 311 A.2D 914 (1973); COMMONWEALTH V. SWANGER, 453 PA. 107, 110-111, 113-114, 307 A.2D 875 (1973); COMMONWEALTH V. POLLARD, 450 PA. 138, 142, 299 A.2D 233 (1973); COMMONWEALTH V. DUSSELL, 439 PA. 392, 395, 397, 266 A.2D 659 (1970).

> REPRESENTS A REFUSAL TO ACCEPT ACCOUNTABILITY FOR OUR DECISIONS ON FEDERAL CONSTITUTIONAL LAW AND AN UNWILLINGNESS TO LEAVE TO THE HIGHEST FEDERAL COURT THE LAST WORD ON QUESTIONS OF SUCH LAW. IF THIS COURT SEES FIT TO BASE A HOLDING IN A CASE UPON ITS INTERPRETATION OF THE FEDERAL CONSTITUTION, AS IT CLEARLY DID IN CAMPANA, THEN IT MUST TOLERATE REVIEW OF SUCH A DECISION BY THE SUPREME COURT OF THE UNITED STATES. IT WILL NOT DO, WHEN OUR DECISION IS UNDER CHALLENGE, TO ANNOUNCE THAT WE WERE MERELY EXERCISING A SUPERVISORY POWER. IN SHORT, SINCE THE MAY 4, 1973 OPINIONS OF JUSTICES ROBERTS AND EAGEN (IN WHICH A MAJORITY OF THE COURT JOINED) ARE PLAINLY BASED ON THE FEDERAL CONSTITUTION'S DOUBLE JEOPARDY CLAUSE, WE SHOULD NOT HESITATE TO SAY SO. [FOOTNOTE OMITTED]

COMMONWEALTH V. CAMPANA, 455 PA. 622, 314 A.2D 854 (1974), DISSENTING OPINION OF POMEROY, J. AT 631, 314 A.2D AT 859 (ON REMAND FROM THE UNITED STATES SUPREME COURT; PENNSYLVANIA V. CAMPANA, 414 U.S. 44, 94 S.CT. 73 (1973)).

SINCE THE BASIS OF THE PENNSYLVANIA SUPREME COURT'S DECISION IN THIS CASE IS CLEARLY THE UNITED STATES CONSTITUTION, A REMAND IS UNNECESSARY.



## CONCLUSION

FOR THE FOREGOING REASONS, THE COMMONWEALTH OF PENNSYLVANIA RESPECTFULLY REQUESTS THAT A WRIT OF CERTIORARI ISSUE TO REVIEW THE DECISION BELOW.

RESPECTFULLY SUBMITTED,

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IN THE SUPREME COURT OF THE UNITED STATES

COMMONWEALTH OF PENNSYLVANIA : OCTOBER TERM, 1976
PETITIONER

v. :

HARRY MIMMS : NO. 76-1830
RESPONDENT

CERTIFICATION OF SERVICE

I, STEVEN H. GOLDBLATT, ESQUIRE, COUNSEL FOR PETITIONER, COMMONWEALTH OF PENNSYLVANIA, HEREBY CERTIFY THAT I HAVE CAUSED A COPY OF THIS PETITIONER'S REPLY MEMORANDUM TO BE SERVED UPON STEPHEN ROBERT LaCHEEN, ESQUIRE, COUNSEL FOR RESPONDENT, HARRY MIMMS, BY DEPOSITING THREE COPIES IN THE UNITED STATES MAIL, FIRST CLASS, POSTAGE PREPAID, ADDRESSED TO STEPHEN ROBERT LaCHEEN, ESQUIRE, 3100 LEWIS TOWER BUILDING, FIFTEENTH AND LOCUST STREETS, PHILADELPHIA, PENNSYLVANIA, 19102, ON FRIDAY, SEPTEMBER 30, 1977.

Steven H. Goldblatt
STEVEN H. GOLDBLATT